IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-8841

ROBERT B. MARTIN,

Petitioner,

vs.

RICHARD J. ELROD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Petitioner, Robert B. Martin, respectfully prays that a writ of certiorari be issued to the Appellate Court of Illinois, First District, to review its decision affirming the trial court's judgment denying his petition for a writ of habeas corpus pursuant to the Uniform Extradition Act, and ordering that he be turned over to the demanding State.

JUDGMENT BELOW

The Illinois Appellate Court, First District, filed its opinion and entered judgment on March 12, 1976 (No. 61283; a copy of the opinion is set forth as Appendix A hereto). Petitioner filed no petition for rehearing. His timely petition for leave to appeal to the Illinois Supreme Court No. 48451 was denied on September 29, 1976 (Appendix B).

JURISDICTION OF THIS COURT

The judgment sought to be reviewed (the Illinois Supreme Court's denial of the petition for leave to appeal) was entered on September 29, 1976. This petition for writ of certiorari is filed within 90 days from said denial. Jurisdiction of this Court is invoked under Title 18, United States Code, Sec. 1257(3) and Rule 22.3 of the Rules of this Court.

QUESTIONS PRESENTED FOR REVIEW

1. In extradition proceedings, where the person sought by the demanding State (here, petitioner) produces evidence that he was not in the demanding State at the time of the alleged crime, does a "judicially created" law—which both imposes a burden upon petitioner to prove beyond

a reasonable doubt that he was not in the demanding State and holds that he cannot meet such a burden so long as the State presents any evidence—create an unrebuttable presumption, in violation of petitioner's right to due process of law?

2. Under circumstances as in Question No. 1, does the State rule violate a person's right to a meaningful hearing, as guaranteed by due process of law?

3. Under the circumstances as in Question No. 1, does the State violate the concept of a citizen's presumption of innocence?

4. Was petitioner's right to confrontation violated where, in an extradition hearing as above set forth, the court unduly restricted his opportunity to cross-examine the State's sole witness as to facts from which the fact-finder reasonably could have inferred that the witness had specific prejudice against petitioner?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part that:

> "Section 1. . . . [N]or shall any State deprive any person of . . . liberty . . . without due process of law; . . ."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy • • • the right to be confronted with the witnesses against him • • •."

RAISING THE FEDERAL QUESTIONS

Petitioner raised the questions presented, listed above, in the trial court and on direct appeal, and both the trial court (Tr. 20, 79)[1] and the appellate court (App. 3a-4a), specifically ruled against him thereon. Said questions were also raised in the Supreme Court, which denied the petition for leave to appeal.

STATEMENT OF THE CASE

The extradition papers alleged that petitioner was wanted for an offense which occurred on April 2, 1973, in the State of California. In the Petition for Writ of Habeas Corpus, petitioner denied that he was in the State of California on said date.

At a hearing to determine if petitioner was in the State of California on April 2, 1976, the State did not present either the victim of the crime or any police officer from the State of California.

The State presented only the testimony of Mrs. Louise Norton, petitioner's ex-mother-in-law. She testified that from March 30, 1973 until the morning of April 2, 1973, petitioner was in California, living at her home. The court limited cross-examination in regard to her bias against petitioner, involving conflict concerning custody of petitioner's minor child, who was then in the custody of the witness, his ex-mother-in-law. The following occurred:

"Q. Now, Mrs. Norton, you have custody of the son of the relator here, is that right?

A. Yes.

[1] "Tr." refers to transcript page in the trial court.

Q. And Mrs. Norton, you are afraid, are you not, that he will try to—

Mr. Glenville: Objection, your Honor.

Mr. Brody: Let me finish my question.

The Court: Let him finish.

Mr. Brody: Q. You are concerned, aren't you, that he might try to regain custody of his boy?

Mr. Glenville: Objection.

The Court: Sustained.

Mr. Brody: Q. You want to see Robert Martin go to jail, don't you?

Mr. Glenville: Objection.

The Court: Sustained." (Tr. 20)

Relator presented four unimpeached witnesses demonstrating that he was not in California on April 2, 1973. He presented his ex wife, who substantially impeached Louise Norton, that she had made prior statements that petitioner had left California prior to March 16, 1973.

Petitioner Robert Martin, without impeachment, testified that on April 2, 1973, he was in Spring Grove, Illinois and that he was not in California on said date. (Tr. 60)

The trial court, in denying the petition, stated:

"The Court: I find that the evidence that was adduced at the hearing raises the *contradiction* in evidence that was stated by the cases cited in the previously submitted brief by Mr. Glenville that I feel that the Defendant has or the petitioner has not *established beyond a reasonable doubt his presence in the State* of Illinois and that would be the test that I would have to apply in this type of hearing." (Emphasis added.)

The Illinois Appellate Court held that relator was not denied his right to cross-examine, and that the trial court applied a proper standard in denying him relief. (App. 2a-3a)

REASON FOR GRANTING THE WRIT

I.

THE ILLINOIS RULE IMPOSING UPON DEFENDANT A BURDEN TO PROVE BEYOND A REASONABLE DOUBT THAT HE WAS NOT IN THE DEMANDING STATE, AND FURTHER, THAT HE CANNOT MEET HIS BURDEN IF THERE IS ANY CONTRARY EVIDENCE, VIOLATES DUE PROCESS.

The Illinois law controlling the burden upon petitioner disputing that he was in the demanding State, requires petitioner to prove beyond a reasonable doubt that he was not in the demanding State, and then holds that he can never sustain this burden if there is *any*, yes, *any* evidence contrary to his evidence. *People* v. *Lohman*, 13 Ill.2d 506, 150 N.E.2d 116 (1958). *People* v. *Woods*, 39 Ill.2d 381, 235 N.E. 2d 601 (1968).

This rule creates an irrebuttable presumption. For where you can never prevail if there is *any* contradicting evidence, there is a *de facto* irrebuttable presumption. "A presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th Amendment." *Manley* v. *Georgia*, 279 U.S. 1, 6 (1920).

Even a rebuttable presumption, to be constitutional, must have a rational basis. *Tot* v. *United States*, 319 U.S. 463 (1943); *Leary* v. *United States*, 395 U.S. 6, 30-54 (1969). The irrebuttable presumption that petitioner has not sustained his burden—if there is any contradictory evidence—is irrational and violates due process.

The Illinois rule, as that found unconstitutional in *Cool* v. *United States*, 409 U.S. 100, 34 L.Ed.2d 335 (1972), creates an artificial barrier to considering relevant evidence. For his evidence is deemed worthless if there is any other evidence. In *People* v. *Woods, supra*, the court held it proper to deny an indigent defendant's request to have witnesses produced because their testimony would be irrelevant, since there was some testimony that defendant had been in the demanding State.

The result of the rule is to deny respondent a meaningful hearing. If due process requires a meaningful hearing before a parolee can be returned to an institution, *Morrisey* v. *Brewer*, 408 U.S. 417 (1972), and before a school child can be disciplined, *Goss* v. *Lopez*, 419 U.S. 565, 42 L.Ed.2d 725 (1975), and before a prisoner's good time credits can be limited, *Wollf* v. *McDonnell*, 418 U.S. 539, 41 L.Ed.2d 935 (1974), and before welfare rights can be denied, see *Goldberg* v. *Kelly*, 397 U.S. 254, 25 L.Ed. 2d 287 (1970), due process must insure that before a citizen can be denied his liberty and transported across the country, he has a meaningful hearing. A meaningful hearing is denied when he cannot prevail if there is any contradictory evidence.

The rule also denies him his right to present evidence, and cross-examine witnesses. Because his right to so do is no right, where irrespective of the strength of his witness and the lack of credibility of the State's, he must fail because there is contradictory evidence.

The rule is inconsistent with a person's presumption of innocence. *In re Winship*, 397 U.S. 358, 1970.

The Court should grant a writ of certiorari, to determine whether this Illinois State rule violates due process.

II.

THE SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES IS APPLICABLE TO PROCEEDINGS CONTESTING EXTRADITION.

Petitioner was denied his right to demonstrate by Cross-Examination the bias of the State's witness.

Petitioner attempted to demonstrate the motive and bias of the State witness, his mother-in-law, by demonstrating she desired to have him jailed as a means of preventing him from regaining custody of his child. The trial court prevented such inquiry, which is impermissible, if the "confrontation" of witnesses provisions of the 6th Amendment (See *Davis* v. *Alaska,* 415 U.S. 308, 315-318 (1974)) are applicable to Habeas Corpus proceedings, contesting extraditions. The Appellate Court upheld such limitations, on the basis that she had testified to her own belief "that she was not prejudiced against relator in any way and that her parting with him in Newport, California on April 2, 1973 was entirely friendly. (App. 3a) This ruling is identical in content to that rejected in *Davis,* where the Court stated:

> "While counsel was permitted to ask Green *whether* he was biased, counsel was unable to make a record from which to argue *why* Green might have been biased *or* otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a 'rehash' of prior cross-examination. On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts

> from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which '"would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."'" 415 U.S. 308, at 318. (Emphasis added.)

This Court should grant certiorari to determine whether a person contesting extradition has the right to confront witnesses as required by the 6th Amendment of the United States Constitution.

Respectfully submitted,

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APPENDIX A

Opinion of the Appellate Court of Illinois

Mr. Justice Barrett delivered the opinion of the court:

This is an appeal from a circuit court order which dismissed, after hearing, a petition for writ of *habeas corpus* filed by relator, Robert B. Martin, who was arrested in Chicago in May, 1974 by the Federal Bureau of Investigation on an extradition warrant issued by the Governor of California which charged him with the offense of robbery and rape in the State of California on April 2, 1973. He is in the custody of the Sheriff of Cook County, Richard J. Elrod.

The thrust of relator's petition is that he was not in California on April 2, 1973 and that he is not the Robert B. Martin named in the fugitive warrant.

Respondent Elrod presented one witness in opposition to the petition, a Mrs. Norton, a resident of San Clemente, California and former mother-in-law of relator. She testified that he was in her home sleeping and eating on March 30, April 1 and April 2, 1973; that he went out after the evening meal on April 1st but did not know the time he returned, but that on the morning of April 2, 1973 she drove him to Newport, California some 20 to 25 miles from San Clemente and left him off at a bus station. She further stated that he said on parting that he wanted to see someone in Newport and probably then would go to Los Angeles. She also testified that an investigating officer came to her home, had conversations with her and found a shirt

that appears to have been identified by the victim of the crime as the shirt worn by the relator at the time of the offense.

It should be noted here that Mrs. Norton had custody of the relator's 14 year-old son and that relator and his former wife had had some discussion regarding taking custody of the boy from her, but the record is silent as to which of the parents would get the custody.

Relator presented five witnesses; namely, a Mrs. Tessmer, his mother, a resident of Spring Grove, Illinois; Roberta Marchi, a co-worker of Mrs. Tessmer; a Larry R. Moore and his wife, Joan; and Yana Martin, his former wife. He testified in his own behalf. All witnesses placed him in Illinois on April 2, 1973 except Yana Martin, who in April, 1973 resided in California. Their testimony was predicated on having seen him in either Spring Grove, Illinois or Highland Park, Illinois on April 2, 1973. Yana Martin testified that she phoned Mrs. Norton on March 19, 1973 and was told that relator had been there in her home but had left. Relator testified that on April 2, 1973 he lived with his mother and step-father in Spring Grove, Illinois. He further stated that he did not know that he was charged with an offense in California until he was arrested in May, 1974.

OPINION

In this appeal relator contends that the trial court erred in preventing cross-examination of Mrs. Norton on the issue of her bias. We disagree. The objections to questions, "You are concerned, aren't you that he might try to regain custody of the boy," and "you want to see Robert Martin

go to jail, don't you?" were sustained by the trial court. Later, however, in cross-examination she stated that she was not prejudiced against relator in any way and that her parting with him in Newport, California on April 2, 1973 was entirely friendly. The State did not object to that testimony. We hold that relator was not prejudiced by Mrs. Norton's total testimony and that the judge did not abuse his discretion in ruling on the evidence. *People* v. *De Savieu,* 14 Ill.App.3d 912, 303 N.E.2d 782; *People* v. *Matthews,* 7 Ill.App.3d 1059, 289 N.E.2d 98.

Next relator contends that the trial court imposed an impossible burden of proof upon him. Again we disagree. The weight of authority holds that in a *habeas corpus* proceeding challenging the validity of extradition the petitioner is required to prove beyond a reasonable doubt that he was not in the demanding State when the offense was committed. (*People ex rel. O'Mara* v. *Ogilvie,* 35 Ill.2d 287, 220 N.E.2d 172.) In *O'Mara* the court said:

> "One held under a Governor's warrant will not be discharged where the evidence on the question of his presence in or absence from the demanding State is merely contradictory. Rather, to entitle one to release on *habeas corpus,* it must appear from the evidence, beyond all reasonable doubt, that the relator was without the demanding State when the offense was committed." (Citations omitted.)

In the case at bar, the State maintains first that it was the function of the trial judge to determine the credibility of the witnesses and second, having so determined, the trial judge, applying the proper burden of proof, justifiably

found that the relator herein had not established his absence from the demanding State beyond all reasonable doubt. In so doing he followed the rule in the *O'Mara* case, *supra,* and found the evidence presented was merely contradictory and not sufficient to overcome the prima facie case established by the Governor's warrant.

Thirdly, relator contends the trial court erred by permitting the State to utilize a prior consistent statement of a witness to corroborate her in-court testimony. We reject this contention and agree with the State's position that since the relator failed to set forth a proper specification of either the prior consistent statement claimed to have been improperly admitted or the in-court testimony allegedly corroborated, this court is precluded from considering the issue.

In his reply brief relator included his Appendix A of trial testimony on pages 13, 14 and 15 as follows:

"The Court: Overruled.

The Witness*: A. And I dropped him off at the bus station there.

Mr. Glenville: Q. I see. Now, Mr. Martin's ex-wife, did she live in Newport, California?

A. No.

Q. Now, did you have—Approximately on the 2nd day of May, 1973, did you have a visit from one Detective Wiberg of the San Clemente Police Department?

A. Yes.

---

* The witness is Mrs. Norton. (Footnote added by petitioner.)

Mr. Brody: I object to this, if the court please.

The Court: Overruled.

Mr. Glenville: Q. And you had a conversation with him?

A. Yes.

Q. And did you learn, from the conversation that he was investigating the commission of a crime that occurred on April 2nd, 1973?

A. Yes.

Mr. Brody: I object to this, if the court please.

The Court: Overruled.

Mr. Glenville: Q. And did he at that time describe the individual that was involved in this crime?

A. No.

Q. All right. What was the nature of his investigation, when he talked to you on approximately May 2nd, 1973?

Mr. Brody: I object to that, if the court please.

The Court: Overruled.

Mr. Brody: Judge, there is no foundation laid for a question of that kind.

Mr. Glenville: This is a habeas corpus.

Mr. Brody: I know that it's a habeas corpus.

The Court: The question is very casually put.

Mr. Glenville: Q. All right, Mrs. Norton,—

The Court: What did he tell you?

Mr. Glenville: Q. (Continuing)—What did he tell you?

The Court: All right.

Mr. Brody: I would object to that, for the record, your Honor.

The Court: Overruled.

The Witness: A. He wanted to know if Robert Martin was at my house, was in.

Mr. Glenville: I didn't hear the last part.

A. He wanted to know if Robert Martin was at my house.

Q. I see. And did he ask you any other questions, on the date of April 2nd, 1973?

Mr. Brody: I object to leading the witness, Judge.

Mr. Glenville: I'm certainly not leading the witness, Judge.

The Court: Overruled.

The Witness: A. He asked me when I had seen him last. I don't know if he mentioned that I had told him that he was not there at that time.

He said, 'When had you seen him last?' So I told him that I had seen him on April 2nd, 1973.

Mr. Brody: I object to this hearsay, Judge.

The Court: Overruled.

Mr. Glenville: Q. Did Detective Wiberg tell you why he was investigating Robert B. Martin?

A. Yes.

Mr. Brody: I object, Judge.

The Court: Overruled.

The Witness: A. Yes.

Mr. Glenville: Q. And what did he tell you?

A. He said that there had been a robbery and rape in San Clemente."

In our judgment the original defect was not cured. Not once had counsel for the relator stated his grounds for the court's overruling his objections, the issue now raised on

appeal. It is too fundamental to require a citation that a ground for objection not stated in a trial court cannot be raised for the first time on appeal.

In accordance with the foregoing, the dismissal of the petition is affirmed and the cause remanded to the trial court with directions that the relator be remanded to the messenger of the demanding State.

Affirmed, With Directions.

LORENZ, P.J. and SULLIVAN, J., concur.

APPENDIX B

UNITED STATES OF AMERICA

State of Illinois
Supreme Court—ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the thirteenth day of September in the year of our Lord, one thousand nine hundred and seventy-six, within and for the State of Illinois.

PRESENT: DANIEL P. WARD, CHIEF JUSTICE

JUSTICE WALTER V. SCHAEFER

JUSTICE THOMAS E. KLUCZYNSKI

JUSTICE HOWARD C. RYAN

JUSTICE ROBERT C. UNDERWOOD

JUSTICE JOSEPH H. GOLDENHERSH

JUSTICE CASWELL J. CREBS

WILLIAM J. SCOTT, ATTORNEY GENERAL

LOUIE F. DEAN, MARSHAL

ATTEST: CLELL L. WOODS, CLERK

Be It Remembered, that, to-wit: on the 29th day of September, 1976, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

Robert B. Martin,	Petitioner	Petition for Leave to Appeal from Appellate Court First District 62183 H.C. 46722
No. 48451 vs.		
Richard J. Elrod,	Respondent	

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

I, Clell L. Woods, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 19th day of November, 1976.
/s/ Clell L. Woods, Clerk,

(Seal) Supreme Court of the State of Illinois.

IN THE

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OCTOBER TERM, 1976

No. 76-884

ROBERT B. MARTIN,

Petitioner,

vs.

RICHARD J. ELROD,

Respondent.

(On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First District)

BRIEF OF RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner's right to cross-examine witnesses was unduly restricted.

2. Whether petitioner failed to sustain the burden of proof that he was not a fugitive from justice, and therefore his habeas corpus petition was properly denied.

STATEMENT OF THE CASE

Robert B. Martin, the petitioner herein, was arrested in Illinois in May of 1974, under authority of a Governor's warrant issued upon demand of the State of California. Petitioner was charged with having committed the crimes of armed robbery and kidnapping in that state on April 2, 1973.

Petitioner challenged the validity of his detention by filing a petition for writ of habeas corpus in the Circuit Court of Cook County, Illinois on July 22, 1974, contending in part that he was not in California on April 2, 1973. At the hearing on the petition petitioner called five witnesses and also testified on his own behalf. The substance of this testimony was that petitioner was in Illinois on April 2, 1973. The respondent called on its behalf Louise Norton of San Clemente, California, petitioner's former mother-in-law. Mrs. Norton testified that petitioner stayed at her home on March 30, March 31, April 1, and April 2, 1973. Mrs. Norton further testified that she drove petitioner to the bus station in Newport, California on the morning of April 2, 1973, and stated that their parting was friendly. At the conclusion of the hearing, the petition for writ of habeas corpus was quashed, and petitioner appealed.

The Illinois Appellate Court for the First District of Illinois affirmed the dismissal of the petition *(People ex rel. Martin v. Elrod*, 36 Ill. App. 3d 952, 344 N.E.2d 714 (1976), and the Supreme Court of Illinois denied leave to appeal.

ARGUMENT FOR DENIAL OF THE WRIT

I.

PETITIONER'S RIGHT TO CROSS-EXAMINE WITNESSES WAS NOT UNDULY RESTRICTED.

Petitioner contends that he was denied his constitutional right of confrontaton when the trial court allegedly prevented petitioner from showing bias on the part of Mrs. Norton, respondent's witness. Respondent submits that the trial court allowed testimony going directly to the issue of the witness' possible bias, from which inferences favorable to petitioner's position could have been drawn, and that the responses excluded by the court (cited at page 5 of the instant petition) did not unduly restrict cross-examination.

Perhaps if the trial excerpts cited by petitioner on page 5 of his petition constituted his only effort to reach the issue of Mrs. Norton's possible bias, there would be a constitutional error. The record, however, discloses that this is not the case. In approximately 13 pages of cross-examination testimony the record reveals that petitioner was allowed to ask, and the witness allowed to answer several other questions bearing directly on any bias she may have had against petitioner. Early in the direct examination it was established that Mrs. Norton was petitioner's former mother-in-law. (Tr. 10)[1] Moreover, in the same series of questions complained of by petitioner, the witness' testimony established that she had custody of petitioner's son, the fact upon which petitioner seeks to establish bias. In addition, the record reveals that petitioner's ex-wife testified in his behalf that her mother, Mrs. Norton, would "do anything to keep him (petitioner's son) in her custody," (Tr. 52) and that she

[1] "Tr." refers to trial court transcript.

and petitioner had discussed regaining custody of their son from her mother.

Although respondent was entitled to reasonable cross-examination for the purpose of impeaching or discrediting Mrs. Norton's testimony, the extent of cross-examination rests in the sound discretion of the trial judge. It is only where there is an abuse of discretion resulting in manifest prejudice to the defendant that a reviewing court will interfere. Respondent maintains that the record in the instant case shows no such prejudice to petitioner, nor was he denied his right to cross-examine or confront the witness. There was sufficient testimony before the court on the subject of Mrs. Norton's possible bias.

Petitioner's reliance on *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1005 (1974) is misplaced. In *Davis*, as here, defense counsel was allowed to ask whether the witness was biased. This Court found that "counsel was unable to make a record from which to argue *why* Green might have been biased or otherwise lacked the degree of impartiality expected . . ." *Davis v. Alaska, supra* at 318. However, in the case at bar, unlike *Davis*, the record discloses ample testimony from which the trier of fact "could approximately draw inferences relating to the reliability of the witness." *Davis v. Alaska, supra* at 318.

Petitioner was not foreclosed from all inquiry into the possible bias of the State's witness, nor was he prevented from making a record from which inferences supporting a theory of bias could be drawn. Information concerning possible bias was before the court for its determination as to the weight such information should be given in deciding whether petitioner was in California at the time of the alleged offense.

From the foregoing it is clear that petitioner's right to cross-examination was not unduly restricted.

II.

PETITIONER FAILED TO SUSTAIN THE BURDEN OF PROOF THAT HE WAS NOT A FUGITIVE FROM JUSTICE, AND HIS HABEAS CORPUS PETITION WAS PROPERLY DENIED.

A person arrested on an extradition warrant is prima facie in lawful custody, and in a habeas corpus proceeding he must overcome this presumption. *State of South Carolina v. Bailey*, 289 U.S. 412, 53 S. Ct. 667 (1933). In the instant case, petitioner alleged that he was not a fugitive from justice because he was not in the demanding state on the date of the crime. The evidence presented on this point was contradictory, petitioner's witnesses stating that he was in Illinois on the date the crime occurred, and the state's witness testifying that petitioner was in California, the demanding state, on that date. As this Court stated in *Munsey v. Clough*, 196 U.S. 364, 25 S. Ct. 282, 285 (1905), "But the court will not discharge a defendant arrested under the governor's warrant where there is merely contradictory evidence on the subject of presence in or absence from the state, as habeas corpus is not the proper proceeding to try the question of alibi . . ." Moreover, the burden of proof resting upon the habeas petitioner was enunciated in *State of South Carolina v. Bailey*, 289 U.S. 412, 422, 53 S. Ct. 667, 671 (1933). "Stated otherwise, he should not have been released unless it appeared beyond a reasonable doubt that he was without the [demanding state] when the alleged offense was committed . . ." The policy reasons supporting *Bailey* and *Munsey* are as valid today as when those cases were decided. Inasmuch as there was contradictory evidence concerning petitioner's presence in California, the state courts were correct in

denying petitioner's petition for writ of habeas corpus and in finding that petitioner had failed to sustain the required burden of proof.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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March 11, 1977

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I.

THE ILLINOIS RULE IMPOSING UPON PETITIONER A BURDEN TO PROVE BEYOND A REASONABLE DOUBT THAT HE WAS NOT IN THE DEMANDING STATE, AND FURTHER, HOLDING THAT HE CANNOT MEET THIS BURDEN IF THERE IS ANY CONTRARY EVIDENCE, VIOLATES DUE PROCESS.

This Court should reconsider its holding in *South Carolina* v. *Bailey*, 289 U.S. 412 (1933), and its dictum in *Mun-*

sey v. *Clough,* 196 U.S. 364 (1905). Substantial developments regarding the rights of citizens to be free from restraint absent compliance with due process has occurred since those cases were decided. *Cf. Morrisey* v. *Brewer,* 408 U.S. 417 (1972); *Goss* v. *Lopez,* 419 U.S. 565 (1975); *Wolff* v. *McDonnell,* 418 U.S. 539 (1974); *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

Due process is not a stagnant concept, but one which is constantly evolving.

In *Frank* v. *Maryland,* 359 U.S. 360, 371 (1959), this Court stated:

> "Of course, this wise reminder, that what free people have found consistent with their enjoyment of freedom for centuries is hardly to be deemed to violate due process, does not freeze due process within the confines of historical facts or discredited attitudes. 'It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does *a living principle,* due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.' *Wolf* v. *Colorado,* 338 U.S. 25, 27 . . ." (Emphasis added.)

Thus, the decisions in *South Carolina* v. *Bailey* and *Munsey* v. *Clough, supra,* must be re-examined in the light of the expectations and demands of today's society.

II.

THE SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES IS APPLICABLE TO PROCEEDINGS CONTESTING EXTRADITION.

Respondent's attempt to excuse the ruling below by distinguishing *Davis* v. *Alaska,* 415 U.S. 308 (1974), cannot

succeed. Although petitioner was permitted to present evidence of the witness' bias by way of his testimony and that of his ex-wife, he was not permitted to "discredit" the witness by extracting from her, her own admission of prejudice. Confrontation of the witness as protected by the Sixth Amendment requires more than merely being permitted to "mak[e] a record from which inferences supporting a theory of bias could be drawn." (Resp. Br., p. 4)

CONCLUSION

Petitioner prays that this Court will allow his Petition for a Writ of Certiorari to review the decision of the Illinois courts.

Respectfully submitted,

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